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In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

CHEROKEE NATION OF OKLAHOMA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The Cherokee Nation presents three basic arguments in support of its claim that the United States must pay compensation when the government's navigational improvements impair tribal property located within the bed of the Arkansas River. The Tribe contends, first, that the United States failed to reserve a navigational servitude in the 1838 patent that granted the Tribe its fee simple interest in the Arkansas River bed (Resp. Br. 23-24, 27, 28, 32); second, that compensation must be paid because the United States owes a trust obligation to the Tribe (*id.* at 17-23, 33-34); and third, that this Court's decision in *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), indicates that the Tribe is entitled to compensation (Resp. Br. 25, 31-33). None of these arguments survives scrutiny.

1. As we explained in our opening brief (at 28-30), the Cherokee Nation, like any other owner of lands beneath navigable waters, took its riverbed interest subject to the United States' dominant power to regulate and control navigation. Even the court below agreed that, by virtue of the Commerce Clause, "it is certain the United States re-

tained a navigational servitude in the Arkansas River" (Pet. App. 9a). The Tribe's assertion that the Arkansas River is a "private stream" (Resp. Br. 28; see also *id.* at 23-24, 27, 29) finds no support in law or fact. This Court has repeatedly stated that, as a legal matter, navigable waterways are "public property of the nation, and subject to all the requisite legislation by Congress."[1] And as we explain in our opening brief (at 2-6, 32-33) the Arkansas River, as a factual matter, has been an important public artery since the early nineteenth century. Plainly, there can be no dispute that the United States retains a navigational servitude in the Arkansas River.[2]

2. The Cherokee Nation's argument that trust principles require compensation is likewise meritless. As a prerequisite to any takings claim, a plaintiff must identify

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[1] *Wyandotte Co.* v. *United States,* 389 U.S. 191, 201 (1967); *United States* v. *Rands,* 389 U.S. 121, 123 (1967); *United States* v. *Chicago, M., St. P. & P. R.R.,* 312 U.S. 592, 595-597 (1941); *Gilman* v. *Philadelphia,* 70 U.S. (3 Wall.) 713, 724-725 (1865); see also *Kaiser Aetna* v. *United States,* 444 U.S. 164, 179 (1979); *United States* v. *Twin City Power Co.,* 350 U.S. 222, 228 (1956); *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U.S. 53, 69 (1913).

[2] The Cherokee Nation argues that "[w]hen the United States conveyed fee simple title to the navigable Arkansas River to the Cherokee Nation, it no longer had a reason to retain a navigational servitude" (Resp. Br. 23). That statement inverts this Court's reasoning in *Choctaw Nation* v. *Oklahoma,* 397 U.S. 620 (1970). In confirming the Cherokee Nation's title to the bed of the Arkansas River, the Court stated that "the United States seems to have had no present interest in retaining title to the river bed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce" (*id.* at 635).

The Cherokee Nation also suggests at one point (Resp. Br. 34) that even if the United States can exercise its navigational servitude, that does not determine the Tribe's right to compensation. However, as we explain in our opening brief (at 17-22), the existence of a navigational servitude, by definition, exempts the United States from any obligation to pay compensation when the construction of a navigational improvement project impairs property within the bed of a naturally navigable body of water.

a property interest that is cognizable under the Fifth Amendment. See, *e.g.*, *Connolly* v. *Pension Benefit Guaranty Corp.*, No. 84-1555 (Feb. 26, 1986), slip op. 11. It is well settled that the "existence of value alone does not generate interests protected by the Constitution against diminution by the government * * *." *Reichelderfer* v. *Quinn*, 287 U.S. 315, 319 (1932). The Cherokee Nation is entitled to compensation only if the McClellan-Kerr Project has deprived the Tribe of a legally recognized property interest in the bed of the Arkansas River. But the very concept of a federal navigational servitude is based upon the *absence* of any such rights.[3]

Thus, the fact that the United States may exercise trust responsibilities with respect to the Tribe's property interests is irrelevant to the takings inquiry. A trust relationship may create an obligation to administer or protect property rights already in existence (see, *e.g.*, Restatement (Second) of Trusts § 2 (1959)), but it cannot create property rights where none would otherwise exist. Here, the Cherokee Nation has no greater property rights in submerged lands than a state, a private individual, or other non-federal entities. The existence of a trust relationship does not alter that fundamental fact. If, as we contend, the navigational servitude exists, its exercise constitutes neither a breach of trust nor a taking of property.[4]

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[3] This Court has expressly stated that the application of the navigational servitude "is not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject." *United States* v. *Rands*, 389 U.S. 121, 123 (1967). See also *United States* v. *Chicago, M., St. P. & P. R.R.*, 312 U.S. 592, 596-597 (1941); *Gibson* v. *United States*, 166 U.S. 269, 275-276 (1897).

[4] Indeed, the very cases the Tribe relies upon—*United States* v. *Sioux Nation*, 448 U.S. 371 (1980), *Seminole Nation* v. *United States*, 316 U.S. 286 (1942), and *United States* v. *Creek Nation*, 295 U.S. 103

3. The Tribe's claim for compensation gains no support from this Court's decision in *Kaiser Aetna* v. *United States,* 444 U.S. 164 (1979), which held that the United States could not invoke its navigational servitude to require the owners of a shallow private pond, made navigable by private efforts, to open the pond for public use. This Court recognized that *Kaiser Aetna* posed an unusual fact situation that was "so different from typical ones involved in riparian condemnation cases" (*id.* at 176) and that involved government activities "far beyond ordinary regulation or improvement" (*id.* at 178). The Court cited three specific factors that distinguished the case: (1) the pond was "incapable of being used as a continuous highway for the purpose of navigation" (*ibid.*); (2) it had always been considered private property under state law and was "strikingly similar" to fast lands (*id.* at 179); and (3) the private owners, in rendering the pond navigable, could

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(1935)—all show that fiduciary principles are not relevant to the issue before this Court. In Sioux Nation and *Creek Nation,* the Court found that the government's special guardianship powers did not *excuse* it from engaging in otherwise impermissible activities. See U.S. Br. 31 n.25. In *Seminole Nation,* the Court found that the United States' payment of tribal funds to a corrupt tribal government violated a "well established principle of equity that a third party who pays money to a fiduciary * * * with knowledge that the fiduciary intends to misappropriate the money * * * is a participant in the breach of trust and liable therefor to the beneficiary" (316 U.S. at 296). Here, by contrast, the United States' invocation of its navigational servitude is wholly lawful. The government does not violate its trust obligation by refusing to pay an Indian tribe for impairment of noncompensable interests or by exercising valid constitutional powers that advance the public interest. See *Nevada* v. *United States,* 463 U.S. 110, 128 (1983). This same principle dictates rejection of the Tribe's supposedly distinct "fair and honorable dealings" claim, which requires, among other elements, a showing that the United States failed to fulfill a specific obligation to the Tribe (see, *e.g., Aleut Community of St. Paul Island* v. *United States,* 480 F.2d 831, 839 (Ct. Cl. 1973); *Gila River Pima-Maricopa Indian Community* v. *United States,* 9 Cl. Ct. 660, 678 (1986)).

have reasonably expected that they would retain the right to exclude others (*id.* at 179-180). None of those factors is present here.

First, it is beyond dispute that the Arkansas River is a "great navigable stream" (*Kaiser Aetna,* 444 U.S. at 179) that has provided crucial service to interstate commerce since the early nineteenth century. See U.S. Br. 2-6. Second, it is clear that the river, as a naturally navigable waterway, is "incapable of private ownership" (*Kaiser Aetna,* 444 U.S. at 179; see also note 1, *supra*) and that the Tribe's riverbed interests, by definition, cannot be equated with fastlands. And third, given the United States' long history of navigation on and improvements to the Arkansas River, predating the Treaty of New Echota, Dec. 29, 1835, 7 Stat. 478 *et seq.*, and continuing through the nineteenth and twentieth century (U.S. Br. 2-6, 32-33), the Cherokee Nation cannot credibly claim any reasonable expectation that it could exclude navigation from the Arkansas River.[5]

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[5] The Cherokee Nation argues (Resp. Br. 33) that the Treaty of New Echota gave the Tribe an unqualified "right to exclude" non-Indians from passage on the Arkansas River. However, the Treaty simply states that the Tribe shall be protected from "citizens of the United States, who may attempt to *settle* in the country without [the Tribe's] consent" (art. 6, 7 Stat. 481) (emphasis added). The Tribe also suggests (Resp. Br. 32) that the historical hardships its members have endured should be considered in determining whether the Tribe is entitled to compensation. Although portions of the Cherokee Nation's history are indeed tragic, that circumstance does not provide an open-ended justification for compensation whenever the Tribe sues the United States. The Cherokees have brought numerous actions against the United States for damages arising from their relocation to Oklahoma and have received substantial compensation from the government. See *Cherokee Nation of Oklahoma: Hearings on H.R. 2329 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary,* 97th Cong., 1st Sess. 27-28 (1981); H.R. Doc. 383, 96th Cong., 2d Sess. 31-32 (1980) (Final Report of the Indian Claims Commission).

Plainly, *Kaiser Aetna's* holding is limited to the factual situation of that case, and does not supplant the long established principle, fully applicable here, that the United States owes no compensation when the construction or operation of a navigational improvement project impairs property interests in the bed of a naturally navigable body of water.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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